Public Finance Bhd v Harta Pertama Sdn Bhd & Ors

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO M-02-569 OF 1996
GOPAL SRI RAM, ABDUL KADIR SULAIMAN AND ALAUDDIN JJCA
8 NOVEMBER 2002

Civil Procedure *— Appeal — Memorandum of Appeal — Point not addressed specifically in memorandum of appeal — Point not raised before trial judge — Whether proper for appellate court to address point at appellate stage — Whether intervention by appellate court would constitute a breach of the rules of natural justice*

Civil Procedure *— Trial — Recall of witness after close of case — Undertaking by counsel to limit scope of questioning during recall — Whether counsel bound by such undertaking*

At the trial in the High Court the issue was whether a demand had been made against the guarantor respondents ('defendants'). At the close of the appellant's ('plaintiff's') case, an agreement was reached between counsel that the appellant be permitted to recall a witness ('PW1') for the limited purpose of proving that a notice of demand had been sent out to the guarantor respondents ('defendants'). The appellant's counsel gave the court an undertaking that he would limit his questions to a comparison of the notice of demand with its original. When the appellant's counsel attempted to widen the area of inquiry during the recall, the judge refused to permit such a course. The appellant appealed to the Court of Appeal against this refusal. During the appeal, appellant's counsel also sought to raise another point not addressed specifically in the memorandum of appeal.

Held, dismissing the appeal with costs to the respondents:

(1) Counsel for the appellant, having given an undertaking, was bound by its solemn terms. If the trial judge had acceded to the application to widen the inquiry that would have caused a serious miscarriage of justice for it would have traversed the undertaking which led to the respondents' agreeing to the recall (see p 601F–G).

(2) The other point counsel sought to raise was not addressed specifically in the memorandum of appeal and it was thus inappropriate for the Court of Appeal to express any views on the matter. This is was particularly so when the point was not put to the trial judge at the conclusion of the case in the manner it was put before the Court of Appeal. Any attempt by the Court of Appeal to intervene in this appellate stage would constitute a breach of the rules of natural justice especially when the trial judge had not been given an opportunity to express his views on the matter (see p 602C–E).

[Bahasa Malaysia summary

Semasa perbicaraan di Mahkamah Tinggi isu adalah samada satu tuntutan telah dibuat terhadap penjamin responden ('defendan'). Pada penutupan kes perayu, satu perjanjian telah dicapai antara peguam bahawa perayu dibenarkan memanggil kembali saksi ('PW1') hanya bagi maksud membuktikan satu notis tuntutan telah dihantar kepada penjamin responden ('defendan). Peguam perayu memberi mahkamah akujanjinya bahawa dia akan menghadkan soalannya kepada perbandingan di antara notis tuntutan dengan salinan asalnya. Apabila peguam perayu cuba meluaskan pertanyaan, hakim tidak membenarkannya berbuat demikian. Perayu telah merayu kepada Mahkamah Rayuan terhadap keputusan ini. Semasa rayuan, peguam perayu juga telah cuba untuk membangkitkan isu yang tidak secara spesifik diwujudkan dalam memorandum rayuan.

Diputuskan, menolak rayuan tersebut dengan kos kepada responden:

(1) Peguam perayu, setelah memberi akujanjinya, adalah tertakluk kepada termanya. Sekiranya hakim perbicaraan telah bersetuju kepada permohonan untuk meluaskan pertanyaan, ini akan membawa kepada satu penyalahan undang-undang yang serius, kerana ia akan membatalkan akujanji yang membawa kepada responden menyetujui pemanggilan kembali tersebut (see p 601F–G).

(2) Isu seterusnya yang kaunsel ingin menimbulkan tidak dinyatakan secara spesifik dalam Memorandum Rayuan maka adalah tidak wajar bagi Mahkamah Rayuan untuk membuat sebarang pendapat terhadap perkara tersebut, lebih-lebih lagi memandangkan fakta ini tidak dihadapkan kepada hakim perbicaraan semasa kesimpulan kes tersebut sepertimana ia dihadapkan kepada Mahkamah Rayuan. Sebarang tindakan Mahkamah Rayuan untuk campurtangan pada tahap rayuan ini akan membawa kepada pemungkiran peraturan keadilan asasi terutamanya memandangkan hakim perbicaraan tidak diberikan peluang untuk menyatakan pendapatnya terhadap perkara ini. (lihat ms 602C–E).]

Notes

For cases on memorandum of appeal, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 970–977.

For cases on recall of witness after close of case, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) para 6442.

Cases referred to

Muniandy a/l Thamba Kaundan v D & C Bank Bhd [1996] 1 MLJ 374 (refd)

Appeal from: Suit No 22–13 of 1989 (High Court, Melaka)

Tiu Long Kim (*Koh Kim Leng & Co*) for the appellant.

Manjit Singh (*Yau, Jiok Hua & Co*) for the first, second and fifth respondents.

Jaspal Singh Gill (*Raghbir Singh Norizan & Co*) for the sixth and seventh respondents.

Gopal Sri Ram J (delivering judgment of the court): This is a fairly straightforward case. There is no issue of law involved here.

The appellant brought an action against the respondents to recover monies lent to the first respondent, which loan was guaranteed by the other respondents. At the trial, the issue was whether a demand had been made against the guarantor respondents. The appellant called evidence in support of its case. At the close of that case, the respondents submitted that there was no case to answer. However, at that stage there was an agreement reached between counsel that the appellant be permitted to re-open its case and recall PW1 for the limited purpose of proving that a notice of demand had in fact been sent out to the guarantor respondents/defendants. Counsel for the plaintiff/appellant in the court below gave an undertaking to the court that he would indeed limit his questions to a comparison of the notice of demand with its original. That was the only purpose for which the recall was agreed upon and permitted by the learned judge. However, after PW1 had taken the stand on the recall, counsel for the appellant sought to widen the area of inquiry. This was objected to and the learned judge, in our view, quite rightly refused to permit such a course to be pursued.

Before us, counsel for the appellant has sought to argue that the learned judge was wrong in refusing counsel in the court below for the appellant (not Mr Tiu who appears before us today) to ask the additional questions. It is counsel's argument that the learned judge should have acted in the interests of justice and permitted the further inquiry. In our view, there is no merit in this complaint.

Counsel for the appellant in the court below, having given an undertaking, was bound by its solemn terms. He had represented to the court that he would limit his questions on the recall solely to the comparison of P2 with its original. If the judge had indeed acceded to the application to widen the inquiry, that would, in our view, have indeed caused a serious miscarriage of justice for it would have traversed the undertaking which led to the respondents' agreeing to the recall.

At the end of the whole case, the learned judge undertook a careful examination of the evidence. He came to the conclusion that the appellant had failed to prove service of the demand upon the guarantors. In arriving at his conclusion, he relied on the following passage from the judgment of the Federal Court in *Muniandy a/l Thamba Kaundan v D & C Bank Bhd* [1996] 1 MLJ 374 at p 382:

> It is obvious that 'sending' a notice is a far cry from 'serving' a notice and I had, during the arguments, pointed this out to counsel for the chargees, and he readily agreed with this proposition. Indeed, there was no proof of posting

of this notice, and even if there had been, this even if accompanied by the fact that it was not returned, would not have sufficed as proof of service, in the absence of a deeming clause in the contract of loan or the annexure to the charge, bearing in mind especially the denial on oath by the chargors of receipt ...'. A

In our judgment, the learned judge directed himself correctly on the law. So far as the facts are concerned, the learned judge's refusal to accept the evidence of the appellant's witnesses is a matter well within his province as the primary trier of facts. We have said often enough that we will not interfere with such findings of fact save in exceptional cases. This is not an exceptional case. B

The other point raised before us by the appellant is that the learned judge ought to have entered judgment against the first respondent as borrower despite any infirmities that the appellant's case might have had against the guarantor respondents. C

We invited Mr Manjit Singh, counsel for the first respondent to deal with that argument. He has pointed out to us that this complaint has not been addressed specifically in the memorandum of appeal. We agree. In those circumstances, we consider it inappropriate for us to express any views on the matter. This is particularly so when the point was not put to the learned judge at the conclusion of the case in the fashion it has been done before us. In our view, any attempt on our part to intervene at this point in the case would constitute a breach of the rules of natural justice, especially when the learned judge has not been given an opportunity to express his views on the matter. D E

For the reasons already given, this appeal fails. It is dismissed. The orders of the learned judge are affirmed.

Abdul Kadir Sulaiman JCA: This appeal is dismissed with costs to the respondents. Deposit to the respondents towards account of taxed costs. The orders of learned judge are affirmed. F

Appeal dismissed with costs to the respondents.

Reported by Andrew Christopher Simon G

H

I